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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v

NORBERT NISAN KAHAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 14a–15a) was entered on May 16, 1973. On July 9, 1973, the court of appeals (three judges dissenting) denied a petition for rehearing *en banc* (App. C, *infra*, pp. 16a–17a). Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to

and including September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant's false statements uttered in a pretrial hearing may, when relevant, be proved against him at trial.

STATEMENT

Respondent Norbert Nisan Kahan and a co-defendant, Bertha Newman, were charged in a 67-count indictment with numerous offenses arising out of a scheme to defraud nonresident aliens and the Immigration and Naturalization Service (INS).[1] Respondent was convicted after a jury trial on one count of conspiracy, seventeen counts of receiving unlawful gratuities, two counts of making false statements, and on one count of perjury.[2] Respondent was sentenced to five years' imprisonment and fined $15,000; execu-

[1] Respondent Kahan and co-defendant Newman were charged with one count of conspiracy to violate 18 U.S.C. 201(f), 201(g) and 1001, in violation of 18 U.S.C. 371. Respondent was further charged with 20 counts of receiving gratuities as an INS employee in connection with the adjudication of applications submitted to the INS, in violation of 18 U.S.C. 201(g); 3 counts of making false statements on certain INS forms, in violation of 18 U.S.C. 1001; and 2 counts of perjury before the grand jury, in violation of 18 U.S.C. 1623. Co-defendant Newman was charged with 21 counts of submitting applications to the INS containing false statements, in violation of 18 U.S.C. 1001 and 2; and 20 counts of paying gratuities to respondent, in violation of 18 U.S.C. 201(f) and 2.

[2] Co-defendant Newman was convicted of the conspiracy count, 17 counts of paying unlawful gratuities, and 18 counts of making false statements.

tion of the prison term was suspended on condition that respondent pay the fine, the bill of the Court Reporter for a daily copy of the trial which he had ordered, and his court appointed attorney's fee within 24 hours. Respondent promptly made the payments. The court of appeals reversed respondent's conviction [3] on the ground that his false statements as to his indigency, made at arraignment to obtain free counsel, were improperly admitted against him in the government's case-in-chief.

1. Respondent and his co-defendant were shown to have been involved in a scheme to secure unlawful payments from nonresident aliens in return for providing extensions of their visa permits. Co-defendant Newman would fill out aliens' extension applications—usually at her apartment—and receive a fee of $100 in excess of the normal application fee. She would then take the applications to respondent, an INS inspector, who would summarily approve them.

After the indictment was filed, respondent appeared at arraignment without an attorney and asked the court to assign counsel for him. The court questioned respondent as to his financial status in order to determine whether he was eligible for appointed counsel under the Criminal Justice Act (18 U.S.C. 3006A(b)). Respondent represented that he had "no current funds

[3] Co-defendant Newman's conviction was affirmed in all respects.

at all" and that his money was "blocked by my wife from whom I am divorced."[4] At the time he made

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[4] The transcript of the colloquy at arraignment, which was introduced at trial, reads as follows:

"The COURT. Your name, sir?

"Defendant KAHAN. I am Norbert Kohan, sir.

"The COURT. Have you an attorney?

"The DEFENDANT. No, sir.

"The COURT. Have you any money to hire an attorney?

"The DEFENDANT. I do, sir, but it is blocked by my wife from whom I am divorced.

"The COURT. Do you want a week to try and straighten that out?

"The DEFENDANT. There is a suit coming up sometime early next year.

"The COURT. We can't wait until next year.

"The DEFENDANT. Then, if it pleases the Court, I would like to have the Court assign me an attorney.

"The COURT. You have no current funds?

"The DEFENDANT. I beg your pardon?

"The COURT. You have no current funds at all?

"The DEFENDANT. No, sir.

"The COURT. Are you working?

"The DEFENDANT. No, sir.

"The COURT. I am going to assign Mr. Jesse Berman at this point.

"Mr. Berman, will you accept the assignment?

"Mr. BERMAN. Yes, your Honor.

"The COURT. All right.

"Mr. EATON. Your Honor, the government would request that the defendant be put under oath to swear to the Criminal Justice Act form and be warned—

"The COURT. That will certainly follow.* You will review that with him, I am sure, Mr. Berman.

"Mr. BERMAN. I will, your Honor.

"The COURT. And determine whether or not he meets the requirements of the Criminal Justice Act."

* * * * *

See fn. on p. 5.

these representations, respondent had approximately $27,000 in four bank accounts over which he had exclusive control.[5]

At trial the government introduced the accounts, which showed that in 1970 and 1971 respondent had deposited more than his entire adjusted income as

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(Adjourned to Second Call.) Second Call.

"Mr. BERMAN. I have conferred with the defendant about his financial status and I am satisfied that he is without means. He worked for twenty-one years until about two weeks ago for the Department of Immigration & Naturalization, and he has been suspended because of this case, so he is not employed at the present time. He has no savings account in any bank in his own name. He had a joint account with his wife but since their divorce she has control of that account. And he very strongly offers to reimburse the Government should he be successful in his lawsuit against his ex-wife for the control of that account, but at the present time he has no money.

"The COURT. Have you filled out the usual form?*

"Mr. BERMAN. No, I haven't yet.

"The COURT. Will you see that he gets that. Mr. Clerk?

"The CLERK. Yes, your Honor.

"The COURT. Submit it in due course.

"Mr. BERMAN. Surely, your Honor."

*At trial it was determined that respondent never did make these averments under oath, either orally or by presentment of written affidavit (Tr. 1384–1385).

[5] The accounts were "Totten" trusts which, under New York law, were under respondent's exclusive control and could be freely depleted by him at any time. During the period immediately subsequent to respondent's request for court appointed counsel, he did make frequent withdrawals from these accounts, including one of $5,000 (Government Exhibits 66–70). And on the very day respondent made his claim of indigency in district court, he deposited $400 in one of the accounts (Government Exhibit 69).

reported by him on his tax returns. This evidence was received as a basis for an inference that respondent had received some of the money paid to his codefendant by aliens seeking extensions of their visas. Respondent's false statements concerning his assets were likewise introduced as false exculpatory statements evincing a consciousness of guilt, and also as similar acts tending to show the willfulness of his perjury before the grand jury.

2. The court of appeals reversed respondent's conviction, holding that his false pretrial statements, made in order to secure court appointed counsel, for which he was not eligible, should not have been admitted in the government's case-in-chief. The court below ruled that respondent had been improperly forced to choose between the Fifth Amendment right to remain silent and his Sixth Amendment right to counsel. Reliance was placed on *Simmons* v. *United States*, 390 U.S. 377, and *United States* v. *Branker*, 418 F. 2d 378 (C.A. 2). The court viewed *Simmons* as precluding any distinction between false statements made to fraudulently claim a right and admissions made in the course of asserting a right: "The ultimate truth of the matter asserted in the pretrial request for appointed counsel is of no moment. See *Simmons* v. *United States*, 390 U.S. 377, 393 (1968)" (App. A, *infra*, p. 4a).

Judge Mansfield dissented. He acknowledged that an accused's self-incriminatory pretrial testimony offered to secure a Fourth Amendment or Sixth Amendment right may not be later admitted as part of the government's case-in-chief. However, in his view, *Simmons* "was founded on the principle that an ac-

cused should not be deterred from telling the truth at a pretrial hearing even though it would involve admissions of an incriminating nature" (App. A, *infra*, p. 10a). Judge Mansfield concluded, "No legitimate interest is protected by extending the rule to outright perjury or falsification. * * * It is unnecessary to grant [the accused] a license to falsify in order to protect his exercise of his pretrial constitutional rights" (App. A, *infra*, pp. 10a–11a).

REASONS FOR GRANTING THE WRIT

In banning the use at trial of respondent's false statements at arraignment, the court below declared, "The ultimate truth of the matter asserted * * * is of no moment" (App. A, *infra*, p. 4a). Such a proposition poses a distinct threat to the integrity of the judicial process. The truthfulness of testimony is a fundamental value of our legal system, and false statements or perjury cannot lightly be sanctioned. *Simmons* v. *United States*, 390 U.S. 377, in no way supports the court's decision. Since the ruling below requires the government and the courts to forego an important deterrent to false swearing, without promoting the proper exercise of constitutional rights, review by this Court is warranted.

1. In *Simmons* the Court faced a narrow problem arising from judicially created rules of standing: In order to establish standing to move to suppress the contents of a suitcase on the ground that they had been seized in violation of his Fourth Amendment rights, Garrett (Simmons' co-defendant) had to establish his

ownership of the suitcase. At the suppression hearing, he testified that the suitcase was similar to one he had owned and that he owned the clothing found in the suitcase. Since the suitcase also contained bill wrappers from the bank he was charged with robbing, his testimony was tantamount to a confession of the crime. After the suppression motion was denied, Garrett's admissions at the hearing were introduced against him at trial, and he was convicted. Garrett's dilemma, as the Court stated it, was that he "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" (390 U.S. at 394). Finding "it intolerable that one constitutional right should have to be surrendered in order to assert another," the Court held that Garrett's testimony at the suppression hearing could not be used against him at trial "on the issue of guilt" (*ibid.*).

Respondent alleged that he too was forced to "surrender * * * [one constitutional right] in order to assert another" (*Simmons, supra,* 390 U.S. at 394). And the court below perceived the same dilemma: "A defendant should not be forced to gamble his right to remain silent against his need for counsel * * *" (App. A, *infra,* p. 4a). But this is a false analogy, for two distinct reasons: First, respondent in fact did not face a choice between constitutional rights. Second, as we will argue (*infra,* b., p. 10), "to the extent that [*Simmons'*] rationale was based on a 'tension' between constitutional rights and the policies

behind them, the validity of that reasoning must now be regarded as open to question" (*McGautha* v. *California*, 402 U.S. 183, 212).

a. Unlike the defendant in *Simmons*, respondent was *not* "obliged either to give up what he believed * * * to be a valid [Sixth] Amendment claim or, in legal effect, to waive his Fifth Amendment privilege" (*Simmons, supra*, 390 U.S. at 394). In fact, respondent had no Sixth Amendment right to appointed counsel, since he had money to pay for one. We need not quarrel with the court of appeals' view that "[a] defendant should not be forced to gamble his right to remain silent against his need for counsel" (App. A, *infra*, p. 4a). In fact, respondent faced no "Hobson's choice" between a right to counsel and a right not to incriminate himself. His dilemma was no more than a choice between lying to get a free lawyer and paying to hire one.

In *Simmons* there was a real danger that a defendant might forego a valid Fourth Amendment claim for fear that his admissions—made to establish standing—would be used to incriminate him at trial. A rule forbidding the use at trial of admissions made at pretrial hearings encourages the making of legitimate claims and, in the Fourth Amendment context, increases the efficacy of the exclusionary rule. A rule forbidding the use at trial of false pretrial testimony would have just the opposite effect: it would encourage the making of fraudulent claims and would render constitutional safeguards less effective. Nor can such a rule be justified as a measure to protect a defendant

making a good faith claim. There is no need to lie to assert a right to which one is entitled. He who does lie, as respondent did, to secure a right to which he is *not* entitled, should bear the risk that his lie may be discovered and used against him.[6]

b. This Court has had occasion to reconsider its analysis of the problem in *Simmons* in terms of a "tension" between constitutional rights and has suggested that the *Simmons* holding is better understood as a rule to promote Fourth Amendment values. In *McGautha* v. *California,* 402 U.S. 183, the Court was faced with the asserted "dilemma" of a defendant being tried before a jury empowered to determine both the issues of guilt and penalty. His choice, it was claimed, was either to give up his right to be heard on the issue of punishment, or waive his privilege against self-incrimination. In finding this a false dilemma, the Court questioned the extent to which *Simmons* was based on Fifth Amendment policies. The Court noted that the defendant in *Simmons* had not been "compelled" to incriminate himself in any usual sense of the word. 402 U.S. at 212. The Court suggested that strengthening "the efficacy of the exclusionary rule" was "an analytically sufficient basis for decision" and

[6] In asserting that truthfulness at pretrial proceedings "is of no moment," the court below may have been of the view that if the defendant testifies truthfully at a suppression hearing he will prevail, whereas if he lies, he will lose and thus it is irrelevant whether the defendant lies or not. However, a defendant might testify truthfully as to the facts necessary to establish his standing, yet lose the motion on the merits, because the police had probable cause, did not exceed the scope of a search incident to an arrest, or a host of other reasons.

dismissed as "insubstantial * * * the purely Fifth Amendment interests involved in *Simmons.*" 402 U.S. at 211–212. The Court concluded (402 U.S. at 212–213):

> While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a "tension" between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question, and it certainly cannot be given the broad thrust which is attributed to it * * * in the present case.

McGautha suggests that the claims made in *Simmons* and in the court below should not be analyzed in terms of a "tension" between the right sought to be asserted and the Fifth Amendment. Rather, the focus should be on the right asserted and reasonable means to foster its proper exercise. Stripped of its Fifth Amendment trappings, respondent's claim is very weak indeed. What conceivable Sixth Amendment interest is served by allowing a defendant to lie to fraudulently obtain free counsel, without fear that his lies may be used against him at trial?

2. In related contexts, this Court has made it clear that it will not tolerate the assertion of a constitutional right as a shield for perjury. In *Harris* v. *New York,* 401 U.S. 222, the defendant took the stand in his own defense and blithely told a story totally at odds with his post-arrest statement, which had been suppressed for lack of a proper *Miranda*[7] warning. This Court approved the use of the post-arrest state-

[7] *Miranda* v. *Arizona*, 384 U.S. 436.

ment—obtained in violation of Harris' Fifth Amendment rights—to impeach him at trial. The Court said, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *Harris, supra,* 401 U.S. at 226; see also *Walder* v. *United States,* 347 U.S. 62. By the same token, we urge that "[t]he shield provided by [*Simmons*] cannot be perverted into a license to use perjury [at pretrial hearings] * * * free from the risk of confrontation [at trial] * * *."

In *United States* v. *Knox,* 396 U.S. 77, the defendant, like respondent, asked to be relieved of the consequences of making false statements on the ground that his utterances were coerced in violation of his Fifth Amendment rights. Knox, who made false statements regarding his gambling activities on an Internal Revenue Service form, defended on the ground that the law requiring the information requested on the form unconstitutionally required disclosure of incriminating statements. The crime was committed, in other words, only because the government required disclosures in violation of his privilege against self-incrimination. This claim, too, was rejected. The Court held that " * * * one who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." 396 U.S. at 79. See also *Bryson* v. *United States,* 396 U.S. 64, 72; *Dennis* v. *United States,* 384 U.S. 855, 864–867.

In summary, we do not contest the general principle of *Simmons* that incriminating pretrial testimony, made in order to assert another constitutional claim, may not be used in the government's case-in-chief. However, we see no reason to permit an accused fraudulently to claim a right to which he is not entitled and then to preclude the government from using his lies against him during a subsequent trial. Such a rule can only encourage defendants to perjure themselves at pretrial hearings at which, for example, they are seeking free counsel, asserting claims of coerced confessions, testifying on the *merits* of a Fourth Amendment claim, or relating the details of an allegedly prejudicial line up at a *Wade*[8] hearing.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1973.

[8] *United States* v. *Wade*, 388 U.S. 218.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 706-707—September Term, 1972.

(Argued March 22, 1973 Decided May 16, 1973.)

Docket Nos. 72-2333, 73-1012

UNITED STATES OF AMERICA,

Appellee,

v.

NORBERT NISAN KAHAN and BERTHA LIMO NEWMAN,

Appellants.

B e f o r e :

SMITH, FEINBERG and MANSFIELD,

Circuit Judges.

Appeals by Norbert Kahan and Bertha Newman from a judgment of conviction in the United States District Court for the Southern District of New York for violation of 18 U.S.C. §§2, 201(f), 201(g), 1001 and 18 U.S.C. 371, conspiracy to violate these laws.

Affirmed as to appellant Newman.

Reversed as to appellant Kahan.

SMITH, *Circuit Judge:*

Norbert Kahan and Bertha Newman were convicted on trial to the jury in the Southern District of New York (Constance Baker Motley, *Judge*), of conspiracy, bribery and falsifying visa extension applications. Kahan was also convicted of perjury before the grand jury. Both appeal. Kahan challenges his conviction on grounds of (1) improper striking of character evidence, (2) failure by the jury to consider each count separately, and (3) use in the government's direct case of Kahan's statements made while requesting appointed counsel as violative of his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. Newman contends that the government failed to establish by clear and convincing evidence an independent source for an in-court identification made subsequent to an improper showup and that the court improperly limited her impeachment of the government's witnesses. For the reasons set forth below, we reverse Kahan's conviction and affirm Newman's.

The principal charge involved a scheme to use Kahan's position as an Immigration inspector to obtain monies from non-resident aliens for improper extension of their visa permits. Aliens who in many cases could not speak English went to Newman who filled out their application papers, took $100 in excess of the normal application fee, and later returned an extended visa. Sixteen of those who had sought Newman's services testified at trial to the falsity

of Newman's entries on the applications as set forth in the margin.[1]

The evidence against Kahan was also extensive, although circumstantial.[2]

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1 They stated that Newman filled out the application, that she had not read to them, nor could they read for themselves, the answers she filled in. They further testified that certain answers as made known to them subsequently had no basis in truth nor in any information that they had given to Newman. There was evidence that Newman in fact knew that the answers were false and used answers that were required for an extension.

2 No alien testified to any dealings with Kahan. The sole direct testimony linking Kahan to Newman's scheme was Inspector Piccirillo's testimony that he had seen Newman and Kahan meet twice while he was surveilling Kahan; once on April 13, 1971 and again on April 19, 1971. At the first meeting which took place about five o'clock, the officer saw appellants meet, go into a restaurant, and Kahan depart as he took money out of an envelope and put it into his wallet. At the second meeting Piccirillo observed the entire meeting of the two which lasted about twenty minutes. There was also evidence that Newman had attempted to visit Kahan at work. When questioned by Conely, Kahan's supervisor, Newman lied to him about her purpose for visiting and slipped away.

Newman told one of the alien applicants when he asked why the fee was a hundred dollars, that she had to pay part of it to a friend in Immigration. Newman told another applicant the fee would be $140 because ". . . I have to split it with somebody there (Immigration office) and this man don't want anymore $50." While the usual procedure for filing an application took 30-45 minutes, Mrs. Newman on several occasions needed substantially less time to get the application approved by Kahan. Search of Newman's apartment, after an interview with the FBI during which she denied having prepared any more than six applications or accepting money for assistance in preparing the forms, turned up a box filled with Immigration forms and a looseleaf binder containing 178 carbon copies of I-539 forms. One hundred fifty-five of these applications had been approved by Kahan, a far higher proportion than would be expected in view of the number of inspectors passing on such forms. Kahan's supervisor had discovered that he had been adjudicating I-539's not assigned to him. A year later after having been instructed not to handle any more walk-in I-539's and not to speak to any alien, Kahan approved two more applications both prepared by Newman.

Kahan's bank statement and income tax returns indicated that Kahan had banked all but $500 of his reported income for the year 1970 and $2000 more than his reported adjusted gross income in 1971. Statements

Kahan's third claim of error raises the most substantial question. At arraignment Kahan stated that he was without assets and in need of appointed counsel. These statements were used against him on trial in the government's case in chief. Use of Kahan's false claims of lack of assets was claimed to be violative of his right against self-incrimination and right to counsel. We agree. *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969); *see McGautha* v. *California*, 402 U.S. 183, 239 (1971) (Douglas, J., dissenting). The government's claim that the privilege does not extend to false statements is not well taken. The ultimate truth of the matter asserted in the pre-trial request for appointed counsel is of no moment. *See Simmons* v. *United States*, 390 U.S. 377, 393 (1968). A defendant should not be forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for appointment of counsel.[3] Nor does the mere fact that Kahan's statements were not made under oath take them without the protection of the Fifth Amendment. Addressed by the court as to his financial assets, defendant was required to speak in order to obtain appointed counsel. *Cf. Couch* v. *United States*, —— U.S. ——, 93 S.Ct. 611, 615-16 (1973).

The government urges us to hold any error there might be in admitting Kahan's exculpatory statements harmless. We must decline. Here, as the government admits, the

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of his lack of funds made at arraignment in the context of request for appointed counsel were introduced as evidence of similar acts to the perjury charged and as false exculpatory statements evincing consciousness of guilt. Kahan at the time he made this misrepresentation had access to several Totten trusts totaling more than $25,000.

3 Here Kahan claims not to have understood that assets held in a Totten trust were his. If there has been willful misrepresentation by defendant of his assets, proper remedy lies in prosecution for perjury or false statement and the recovery from him ordered here by the court of counsel fees and expenses improperly paid on his behalf.

evidence against Kahan was entirely circumstantial. Credibility was an essential factor, especially as two counts of the indictment charged the defendant with perjury.[4] Not only did the prosecution introduce the statements in its direct case and argue them in summation, the court also focused on these statements in its instructions to the jury.[5] As there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is required. *See Schneble* v. *Florida*, 405 U.S. 427, 430-31 (1972).

Kahan's two other claims of prejudicial error are without merit. Appellant offered the testimony of one of the directors of his synagogue as to his good character; the testimony was stricken on the grounds that it was not proper character evidence and that the witness was not shown to be sufficiently acquainted with the defendant. Under the

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4 Kahan's defense was his own testimony denying the government's allegations and the testimony of a character witness.

5 "Now, the Government has tendered evidence which it claims shows acts by Mr. Kahan similar to the ones charged in the perjury count.

Mr. Kahan is not on trial for events relating to these similar acts; that is, the statements which he made to the Court at the time of his arraignment regarding his ability to secure a lawyer of his own choosing with his own funds.

You may, however, consider, in determining whether the defendant acted with guilty knowledge or unlawful attempt on the charges of perjury before you, the fact, if you find it to be true, that he engaged in other similar acts to those charged in those perjury indictments.

You are to consider that evidence as to what he said on the arraignment regarding his finances on the question of knowledge and intent only when you are considering the perjury charges made against him in this indictment.

Now, again with respect to that particular evidence, that is, the statements made by Mr. Kahan on his arraignment regarding his finances, there is another principle of law applicable here and that is that conduct of a defendant, including statements which are knowingly made by him upon being informed that a crime has been committed, or that he has been accused of a crime, may be considered by the jury in the light of all other evidence in the case."

prevailing view character evidence must be based solely on reputation in the community; it must be hearsay and cannot be based on the witness' own personal assessment of the defendant or on specific acts reflecting certain qualities. *Michelson* v. *United States*, 335 U.S. 469, 477 (1948). Here the witness stated that he had never discussed nor heard discussion of defendant's reputation as far as truth and veracity because ". . . his actions show that he was a man of truth, veracity, integrity, and I think he's one of the best liked men in the synagogue." Kahan also attempted to bring in through this witness evidence of refusal by him to help the witness through Kahan's position with the Immigration agency, evidence clearly precludable under *Michelson*. *See United States* v. *Beno*, 324 F.2d 582, 587 (2d Cir. 1963).

Prior to introducing character testimony defendant must establish the witness' acquaintance with defendant, the community and his circle of acquaintances. The court properly ruled that a witness who did not know enough about defendant to be aware of defendant's occupation lacked sufficient knowledge of defendant.[6]

Appellant's claim that the jury's guilty finding on several counts of the indictment that had been stricken demonstrated that it had failed to consider each count separately and thus required a new trial is also without merit.[7] The jury answered as to each count and was clearly instructed that it must determine guilt beyond a reasonable doubt on

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6 "Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject." *Michelson* v. *United States*, 335 U.S. 469, 480 (1948).

7 Counts of the indictment were separated for each alien application. The counts stricken were those as applied to particular applicants.

each count.[8] It did in fact acquit Kahan on two counts. There is neither ambiguity in the verdict rendered, *Glenn* v. *United States*, 420 F.2d 1323 (D.C. Cir. 1969), nor is the verdict an "inaccurate and insufficient hotchpotch. . . ." *United States* v. *DiMatteo*, 169 F.2d 798 (3d Cir. 1948). Where separate verdicts are given on each count pursuant to specific instructions to find guilt separately on each count, conviction on all counts is not necessarily negatived by error affecting only one or several of numerous counts. Here, where 67 counts were before the jury the error was, in the words of defense counsel at trial, merely an "oversight," properly corrected as to the stricken counts without affecting the validity of the remaining counts.

Newman challenges the court's finding that the government had proved by clear and convincing evidence that Inspector Piccirillo's in-court identification was based on a source independent of a wrongful showup. *United States* v. *Wade*, 388 U.S. 218 (1967); *see, e.g., United States ex rel. Rivera* v. *McKendrick*, —— F.2d —— (2d Cir., Feb. 15, 1973). Piccirillo, engaged in surveillance of Kahan, testified that while so occupied he had twice observed Newman meeting Kahan. On both occasions the meetings were in daylight, or bright night, and Piccirillo came within several feet of the defendants during the meetings. Each observation was approximately twenty minutes in duration. Notes taken at the time of the meetings indicate that Kahan had met a woman who stood about shoulder high to Kahan, was fair, stocky and had long reddish dyed hair —more black than red. The description fits Newman.

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8 "The Government's failure to establish beyond a reasonable doubt any one of the three elements of the crime of receiving an unlawful gratuity as to any count must result in Mr. Kahan's acquittal of that charge.

On the other hand if you find that the Government has established beyond a reasonable doubt each essential element as to a particular count, then you may convict Mr. Kahan of that particular count."

The unlawful showup occurred six months after the observation. Piccirillo looked in a room for several seconds where Newman was sitting and indicated that she was the woman he saw meet Kahan. While Piccirillo did not link Newman with a photograph of her given him prior to the meeting it appears that the photograph was old, black and white, that it showed only her face and that she had a different hairstyle. Apparently it is appellant's physical stature that is distinctive, a factor not clearly shown in the picture. Piccirillo had observed another woman and specifically found her not to be the woman in the photograph; he did not make a similar finding as to Newman. The finding of an absence of a taint from the showup is fully supported by the record.[9]

The court's limiting of impeachment by the defense of alien witnesses as to questions concerning prior convictions and a prior inconsistent statement was not error. As a general rule a witness' acts of misconduct are not admissible to impeach his credibility unless the acts result in a conviction. *United States* v. *Sposato*, 446 F.2d 779, 780-81 (1971). So far as the offer was of criminal activity as bearing on likelihood of lying solely because other criminal acts had been done, the limitation imposed was proper. *See United States* v. *Kahn and Teleprompter*, 472 F.2d 272, 279-80 (2d Cir. 1973). Here, the court's limitation, such as it was, was imposed only after twelve of the sixteen witnesses had been questioned as to their deliberate falsifying of statements on visa applications. Witnesses who testified subsequent to the limitation testified that their presence in the United States was illegal. So far as the facts indicated a motive to lie to curry favor with the government by law violators they were quite fully developed before the jury.

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9 *Cf. Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States ex rel. Gonsales* v. *Zelker*, slip op. 2891 (2d Cir., April 17, 1973).

We find no error on Newman's appeal and affirm her conviction.

We reverse and remand for retrial as to Kahan.

MAXSFIELD, *Circuit Judge* (Concurring in Part and Dissenting in Part):

I concur in Judge Smith's thorough and thoughtful opinion except as to his conclusion that it was reversible error to have admitted into evidence Kahan's pretrial statement, made in support of his application for appointment of counsel pursuant to the Criminal Justice Act, that he was without funds. Since I disagree with this conclusion, I would affirm the judgment as to both defendants.

It is settled that an accused's self-incriminatory testimony, given at a pretrial hearing in support of his application for enforcement of his Fourth or Sixth Amendment rights, may not later be admitted against him at trial as part of the government's case. *Simmons* v. *United States*, 390 U.S. 377, 389-94 (1968); *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969).[1] To hold otherwise would be

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1 In *Simmons* the defendant, who was charged with armed robbery, moved to suppress the introduction at trial of a suitcase containing a gun holster and several items that had been taken from the bank at the time of the robbery as violative of his Fourth Amendment rights. Justice Harlan stated:

> "The only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner. Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim. . . . Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence

to deter a defendant from the assertion of his lawful constitutional rights. In the words of Justice Harlan, speaking for a 6 to 2 majority in *Simmons*, *supra*, the accused would be "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." Absent a rule barring the government's use on its direct case of the accused's self-incriminatory statements, he would be able to give essential testimony only at the risk that damaging admissions would then be used to convict him at trial.

But when an accused decides to use perjury or false statements as a means of claiming a right (to which he might not be entitled if he told the truth) he faces no such dilemma or Hobson's choice. The salutary rule of *Simmons*, as extended by *Branker* to the exercise of Sixth Amendment rights, was founded on the principle that an accused should not be deterred from telling the truth at a pretrial hearing even though it would involve admissions of an incriminating nature. No legitimate interest is protected by extending the rule to outright perjury or falsification. The latter should carry all of their normal sanctions, including the

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against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.

* * * * *

"In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of *his own testimony connecting himself with the seized evidence.*" (Emphasis added) 390 U.S. at 391, 393.

In *Branker* the defendant was convicted after a retrial of knowingly participating in a scheme to defraud the government by obtaining false tax refunds. At an indigency hearing held after the first trial in connection with his application to appeal *in forma pauperis* he admitted, after first denying that he had received for his personal use any of the refunds, that he had received small amounts out of refund checks cashed by him for others.

admission at trial of the accused's demonstrably false statements wherever they would otherwise be relevant.[2] It is unnecessary to grant him a license to falsify in order to protect his exercise of his pretrial constitutional rights.

Applying these principles here, Kahan's volunteered representation to the court, upon his application for appointed counsel, that he was indigent and had "no current funds" when he had in fact accumulated approximately $27,000 in four bank accounts over which he had exclusive control not only deceived the court but amounted to a false exculpatory statement. *United States* v. *McConney*, 329 F.2d 467, 470 (2d Cir. 1964).[3] The proof showed that, as-

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2 Normally the fact that a defendant may be prosecuted for perjury based on his willful giving of materially false testimony does not preclude the government from offering in evidence his prior false statements where they are relevant and probative with respect to issues, e.g., knowledge, intent, consciousness of guilt. As with all other prejudicial evidence offered by the government, the defendant is protected by obtaining from the court, out of the jury's presence, a preliminary ruling as to the falsity of the earlier statement and its relevance to the issues on trial, which was the course followed by Judge Motley. Indeed she further found that the prejudicial effect of Kahan's statement did not outweigh its probative value.

3 Kahan's pertinent statement to the court was as follows:

"The Court: Your name, sir?

"The Defendant: I am Norbert Kahan, sir.

"The Court: Have you an attorney?

"The Defendant: No, sir.

"The Court: Have you any money to hire an attorney?

"The Defendant: I do, sir, but it's blocked by my wife from whom I am divorced.

"The Court: Do you want a week to try and straighten that out?

"The Defendant: There is a suit coming up sometime early next year.

"The Court: We can't wait until next year.

"The Defendant: Then if it pleases the Court I would like to have the Court assign me an attorney.

"The Court: You have no current funds?

"The Defendant: I beg your pardon?

"The Court: You have no current funds at all?

"The Defendant: No, sir.

"The Court: Are you working?

suming he had spent nothing during the years 1970 and 1971, he had deposited more money in these accounts ($27,000) than his entire legitimate income ($25,000) as reported by him on his tax returns. Evidence to that effect was properly received as the basis for an inference that he received some of the money paid by non-resident aliens to Mrs. Newman to obtain Kahan's approval of their falsified applications for extension of the length of their stay in the United States.

It furthermore appears that, aside from Kahan's false statement to the court as to his finances, which covers but 2 ½ pages out of a total trial transcript in excess of 2,000 pages, the other evidence against him was overwhelming. See majority opinion, *supra* n.2. There was eye-witness testimony of meetings between Kahan and Mrs. Newman, from one of which he was seen to exit, take an envelope out of his pocket, remove money from the envelope and place the money in his wallet. Of 178 copies of INS Form I-539 (Alien's Application to Extend Time of Temporary Stay) found in Mrs. Newman's apartment, 155 had been

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"The Defendant: No, sir.

"The Court: I'm going to assign Mr. Jesse Berman at this point."

Following a conference in the courtroom with his new client regarding his "financial status," Mr. Berman reported to the court, on the basis of what Kahan had just told him, that Kahan "has no savings account in any bank in his own name. He had a joint account with his wife but since their divorce she has control of that account and he very strongly offers to reimburse the government should he be successful in his lawsuit against his ex-wife in the control of that account but at the present time he has no money."

Although Kahan contended at trial that he understood that the Totten savings accounts opened up by him belonged to his children, with himself merely the custodian, Judge Motley properly ruled that there was sufficient proof of falsity to warrant admission of Kahan's statement. It is beyond dispute that if Kahan, upon his arraignment, had disclosed the accounts rather than throw the court off the track by referring to the blocked account in dispute with his wife, denial of assignment of counsel under the Criminal Justice Act would have been mandated.

approved by Kahan. With six full-time inspectors and fourteen part-time inspectors working on such matters at the INS New York office, the chances are infinitesimal that if these 178 applications had been processed in the usual course of business, 87% of them would have been handled by Kahan. Furthermore, one of the forms found in Mrs. Newman's apartment bore Kahan's initials, from which it could reasonably be inferred that after approving it he had in violation of INS procedures returned it to Mrs. Newman. In addition there were Kahan's deposits during the period 1970-71 of approximately $27,000 in accounts controlled by him, which was more than his reported adjusted gross income during the period and could not be satisfactorily explained as coming from legitimate sources.

Assuming that Kahan, upon retrial, decides to take the witness stand in his own defense, his false statement to the district court as to his lack of money will probably be admissible to impeach his testimony, see *Harris* v. *New York*, 401 U.S. 222 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954), or as a false exculpatory statement, even though, according to the majority, it was error to have admitted the statement as part of the government's direct case at the first trial. If, on the other hand, Kahan decides not to take the witness stand, the overwhelming case against him will stand virtually unrebutted. Under the circumstances, even assuming *arguendo* that the admission of his pretrial statement was error, it was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 (1967); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

For the foregoing reasons I would affirm Kahan's conviction.

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 72–2333

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN A.K.A. BERTHA LIMO NEWMAN, DEFENDANTS

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of May one thousand nine-hundred and seventy-three.

Present: Hon. J. Joseph Smith, Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to appellant Bertha Limo Newman but that the judgment as to

appellant Norbert Nisan Kahan be and it hereby is reversed and that the action as to appellant Kahan be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

APPENDIX C

United States Court of Appeals for the Second Circuit

Dockets Nos. 72–2333, 73–1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the ninth day of July one thousand nine hundred and seventy-three.

Present: Hon. J. Joseph Smith, Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

United States Court of Appeals for the Second Circuit

Dockets Nos. 72–2333, 73–1012

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORBERT NISAN KAHAN AND BERTHA NEWMAN, DEFENDANTS-APPELLANTS

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of July, one thousand nine hundred and seventy-three.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, a poll of the judges in regular service having been taken at the request of such a judge, and there being no majority in favor thereof, upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

Judges Friendly, Hays, and Mansfield dissent.

IRVING R. KAUFMAN,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE : 1973 O - 520-250

UNITED STATES *v.* KAHAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–428. Decided February 25, 1974

At respondent's arraignment for improperly receiving gratuities for official acts and for perjury before the grand jury, counsel was appointed to represent him at his request and after he stated he was without funds; he failed, in response to a question as to whether he had funds to employ an attorney, to disclose that he had access to certain savings accounts in which he had deposited $27,000. On trial, his statements as to lack of funds were admitted as false exculpatory statements evincing his consciousness that the bank deposits were incriminating, and as evidence of willfulness in making statements before the grand jury with knowledge of their falsity. The Court of Appeals, in reliance on *Simmons* v. *United States*, 390 U. S. 377, reversed, holding that the admission of the false statements violated respondent's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. *Held:* The incriminating component of respondent's pretrial statements derives, not from their content, but from his knowledge of their falsity, the truth of the matter being that he knew he was not indigent and did not have a right to the appointment of counsel. Nor is there involved what was "believed" by the claimant to be a "valid" constitutional claim, hence respondent was not faced with the "intolerable" choice of having to surrender one constitutional right in order to assert another. *Simmons* v. *United States*, *supra*, distinguished.

Certiorari granted; 479 F. 2d 290, reversed and remanded.

PER CURIAM.

Respondent, a former Immigration inspector, was convicted by a jury in the District Court of numerous counts under a multiple-count indictment; the conviction covered 20 counts of improperly receiving gratuities for official acts, in violation of 18 U. S. C. § 201 (g), and one of perjury before the grand jury, in violation of 18 U. S. C.

§ 1623, arising out of a scheme to defraud nonresident aliens and the Immigration and Naturalization Service. The Court of Appeals reversed respondent's conviction and remanded the case for retrial. 479 F. 2d 290 (CA2 1973). Respondent's motion to proceed *in forma pauperis* in this Court, and the petition for a writ of certiorari, are granted. The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for reinstatement of the judgment of conviction.

At respondent's arraignment, counsel was appointed under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A (b), to represent him after he requested the appointment and stated that he was without funds. In response to a direct question as to whether he had funds to employ an attorney, he failed to disclose that he had access to and control of four savings accounts in which he had deposited approximately $27,000 during 1970 and 1971.[1]

[1] The transcript of the colloquy at arraignment reads in part as follows:

"The Court: Your name, sir?

"The Defendant: I am Norbert Kahan, sir.

"The Court: Have you an attorney?

"The Defendant: No, sir.

"The Court: Have you any money to hire an attorney?

"The Defendant: I do, sir, but it's blocked by my wife from whom I am divorced.

"The Court: Do you want a week to try and straighten that out?

"The Defendant: There is a suit coming up sometime early next year.

"The Court: We can't wait until next year.

"The Defendant: Then if it pleases the Court I would like to have the Court assign me an attorney.

"The Court: You have no current funds?

"The Defendant: I beg your pardon?

"The Court: You have no current funds at all?

"The Defendant: No, sir.

"The Court: Are you working?

[*Footnote 1 continued on p. 241*]

and from which he made frequent withdrawals immediately subsequent to the arraignment. The accounts were apparently established by respondent in so-called "Totten trusts" for his children as the intended donees; under New York law these trusts were revocable at respondent's will. *In re Totten*, 179 N. Y. 112, 71 N. E. 748 (1904). The deposits to these undisclosed accounts aggregated more than the $25,000 which respondent reported as his total legitimate income on his tax returns for 1970 and 1971 and evidence of the deposits was admitted at trial as supporting the inference that he improperly received the gratuities as was charged. As part of the Government's case in chief the District Court admitted evidence of respondent's statements to the court as to his lack of funds.[2] The statements were admitted as false exculpatory statements evincing respondent's consciousness that the bank deposits were incriminating, and as evidence of willfulness in making statements before the grand jury with knowledge of their falsity.

The Court of Appeals held that the admission of respondent's false statements violated his Fifth Amendment privilege against compulsory self-incrimination and

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"The Defendant: No, sir.

"The Court: I'm going to assign Mr. Jesse Berman at this point." At trial it was determined that respondent never made these averments under oath, either orally or by presentment of written affidavit.

[2] Respondent contended at trial that he understood himself to be merely the custodian of the four "Totten trusts," which he said belonged to his children. The trial judge ruled, out of the jury's presence, that there was sufficient proof of falsity to warrant the admission of his statements, that the false statements were relevant to issues on trial, and that the prejudicial effect of the statements did not outweigh their probative value. The jury was ultimately instructed that it should consider respondent's false statements only for the limited purposes, as set forth in text, for which they were introduced.

his Sixth Amendment right to counsel because in its view the "ultimate truth of the matter asserted in the pretrial request for appointed counsel is of no moment. *See* Simmons v. United States, 390 U. S. 377." 479 F. 2d, at 292. The Court of Appeals cited *United States* v. *Branker*, 418 F. 2d 378 (CA2 1969), for its application of *Simmons* v. *United States*, 390 U. S. 377 (1968), to the assertion of the Sixth Amendment right. The Court of Appeals' reliance on *Simmons* misconceives the thrust of that holding.

In *Simmons* one of the defendants, in an attempt to establish standing to move for suppression of a suitcase containing incriminating evidence seized by the police, testified at the pretrial suppression hearing that the suitcase was similar to one he owned. The motion to suppress was denied, and the Government used the defendant's testimony against him in its case in chief. Viewing the testimony as an "integral part" of the claim for exclusion, the Court held its use impermissible because it conditioned the exercise of what the defendant "believed . . . to be a valid Fourth Amendment claim" on a waiver of the constitutional privilege against compulsory self-incrimination. *Id.*, at 391, 394.

To establish standing to move for suppression of evidence assertedly illegally seized, the claimant must show the kind of interest in that evidence set forth in *Brown* v. *United States*, 411 U. S. 223, 229–230 (1973), which would necessarily be incriminating should the motion fail and the defendant's interest therein be introduced. The need to choose between waiving the Fifth Amendment privilege and asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the claim for exclusion, creates what the Court characterized as an "intolerable" need to surrender one constitutional right in order to assert another. *Simmons*, 390 U. S., at 394.

Even assuming that the *Simmons* principle was appropriately extended to Sixth Amendment claims for appointed counsel by the *Branker* holding, a question which we do not now decide, cf. *McGautha* v. *California*, 402 U. S. 183, 210–213 (1971), that principle cannot be applied to protect respondent here. *Simmons* barred the use of pretrial testimony at trial to prove its incriminating content. Here, by contrast, the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity.[3] The truth of the matter was that respondent was not indigent, and did not have a right to appointment of counsel under the Sixth Amendment. We are not dealing, as was the Court in *Simmons*, with what was "believed" by the claimant to be a "valid" constitutional claim, see n. 2, *supra*. Respondent was not, therefore, faced with the type of intolerable choice *Simmons* sought to relieve. The protective shield of *Simmons* is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood. Cf. *Harris* v. *New York*, 401 U. S. 222, 226 (1971).

Reversed and remanded.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Mr. Justice Harlan speaking for the Court in *Simmons* v. *United States*, 390 U. S. 377, 394, said: "[W]e find it intolerable that one constitutional right should have to

[3] The grounds for admitting respondent's false statements, *supra*, at 241, make it clear by necessary implication that the trial judge—who alone decides the question of relevancy—thought respondent had willfully made false representations. Respondent's withdrawals from the aforementioned accounts shortly after he denied having current funds lend support to that view.

be surrendered in order to assert another." In that case an accused testified on a motion to suppress evidence in order to protect his Fourth Amendment rights but later discovered that the testimony would be used by the prosecution against him. We said it was "intolerable that one constitutional right should have to be surrendered in order to assert another," *ibid.* We held that the testimony the defendant gave on a motion to suppress evidence on Fourth Amendment grounds was not admissible against him at trial on the issue of guilt "unless he makes no objection." *Ibid.*

If an accused in order to protect his Fourth Amendment right gives testimony that is protected by the Self-Incrimination Clause of the Fifth Amendment, I fail to see how testimony protective of Sixth Amendment rights is on a lower level. In *United States* v. *Jackson*, 390 U. S. 570, we held unenforceable provisions of a federal act which made the death penalty applicable only to those who contested their guilt before a jury. The "inevitable effect" in that case was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.*, at 581.

The suggestion that no Sixth Amendment right existed in this case does not find support in the record. There is no finding as to the amount of the funds restricted and beyond the reach of the respondent, or as to what free funds he actually had or as to what were his obligations. Yet all of these facts would be necessary before we could reach that conclusion. This Court in passing on applications to proceed *in forma pauperis* looks not only to what the applicant's income and/or cash position is but what his periodic liabilities are. Thus a person with an income of $600 a month has been allowed to proceed *in forma pauperis* where his present

obligations consume his entire income. The mere fact that one has money in the bank is therefore not enough to make frivolous his claim of indigency for purposes of *in forma pauperis*. We may not therefore responsibly say there was no genuine Sixth Amendment right to counsel in this case.

Moreover, whether one has a bona fide claim to appointed counsel is a legal point which laymen should not have to determine before they may speak without fear. The funds here involved were in Totten trusts and Kahan thought that he had no access to them under the law. One should not have to seek advice on points of law nor have an audit conducted on his personal finances before he feels free in asserting his Sixth Amendment rights. Statements made in good faith may later turn out to be false and all those who utter the statements run the risk that they may not be able to convince others of their sincerity. If "tension" between the Sixth and Fifth Amendments arises only when judges, with the benefit of hindsight and legal acumen not possessed by the defendant, later determine the Sixth Amendment claim to be "bona fide," many indigents with legitimate claims to appointed counsel will hesitate to speak freely in asserting the claim. As the court below phrased it, the defendant will be "forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for appointment of counsel." 479 F. 2d 290, 292.

The principle of *Simmons* and *Jackson* is applicable, if reason is to prevail, where rights under the Fifth Amendment are entangled with rights under either the Fourth or the Sixth Amendment. There is such entanglement here, for the Fifth Amendment is as applicable to evidence concerning crimes with which the accused has not yet been charged as it is to evidence concerning crimes already charged. That was so held

by a unanimous Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, 562:

> "It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case."

The Court of Appeals was correct in its application of this issue and I would affirm.

MR. JUSTICE MARSHALL, dissenting.

As the Court's *per curiam* opinion indicates, there is a tension between the Sixth Amendment right to ap-

pointed counsel for indigent defendants and the Fifth Amendment comparable to the tension between the Fourth and Fifth Amendments recognized in *Simmons* v. *United States*, 390 U. S. 377 (1968). The situation presented in *United States* v. *Branker*, 418 F. 2d 378 (CA2 1969), is instructive. There, in truthfully revealing his financial situation at the pretrial indigency hearing, the defendant disclosed that he had received $250 from a coconspirator. In order to assert his Sixth Amendment right to counsel, in other words, he was forced to provide potentially incriminating evidence.

As I view the matter, this tension between the Fifth and Sixth Amendments could be resolved in one of two ways. The first alternative is to permit the defendant seeking counsel as an indigent to lie about his financial situation wherever the truth might be incriminating. As a second alternative, we could require the defendant seeking appointment of counsel to tell the truth at the indigency hearing, and subject him to sanctions for his willful and knowing failure to do so, but bar use of any incriminating information so revealed.

I, for one, do not consider the first alternative to be acceptable. Nor did the Court of Appeals in this case, for it conceded that if the defendant willfully misrepresented his assets at the pretrial hearing, he could be prosecuted for perjury or false statement. 479 F. 2d 290, 292 n. 3 (CA2 1973). See, *e. g.*, *United States* v. *Birrell*, 470 F. 2d 113 (CA2 1972). Likewise, respondent's Memorandum in Opposition disclaims any "right to lie" at the pretrial hearing.

In view of its concession that the defendant can be penalized for willfully and knowingly falsifying information at a pretrial suppression hearing, I cannot understand the Court of Appeals' conclusion that this sanction can only take the form of a separate prosecution for per-

jury. If the defendant's willfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial.

My Brother DOUGLAS raises the possibility that a defendant will fail to exercise his Sixth Amendment rights for fear that a court may later find the Sixth Amendment claim not bona fide or his statements not made in good faith. This reasoning would not only control the present case, however, but would also bar the Government from bringing a perjury prosecution against a defendant who knowingly and willfully lies under oath at his pretrial hearing. For it could likewise be argued that a defendant will fail to exercise his Sixth Amendment rights for fear that a jury may later determine that he committed perjury at the indigency hearing.

The problem is not a frivolous one, but its solution does not lie, in my view, in permitting the defendant to perjure himself and remain free from sanction. Rather, it lies in procedures to ensure that the imposition of sanctions in appropriate cases will not in fact discourage good-faith assertions of Sixth Amendment claims. With respect to a subsequent perjury prosecution, the discouragement of legitimate Sixth Amendment claims is minimized by the requirement that the Government convince a jury that the defendant willfully and knowingly gave false testimony. I would provide a similar protection where the Government seeks to use a defendant's allegedly false pretrial statement as evidence against him at his pending criminal trial. Where such statement was purportedly given in furtherance of a Sixth Amendment right, I would bar the Government from introducing it in evidence unless the Government proved and the trial court found that the defendant had knowingly and willfully provided false information.

The solution, then, to the tension between the Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the truth at his indigency hearing, and to bar use of any incriminating information so revealed. This approach is fully consistent with our Fifth Amendment cases. "[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Lefkowitz* v. *Turley,* 414 U. S. 70, 78 (1973). Where the Government requires the defendant to speak in order to assert his Sixth Amendment rights, it must shelter him with the immunity provided by the Fifth Amendment for such compelled testimony. Cf. *United States* v. *Branker, supra.*

Applying these principles to the present case, I believe respondent's conviction was properly reversed by the Court of Appeals. At trial, Kahan claimed to have understood that the Totten trust accounts he opened belonged to his children, with himself merely the custodian. See 479 F. 2d, at 292 n. 3 and 296 n. 3. The District Court never made a finding, before admitting evidence of Kahan's pretrial statements, that Kahan had willfully misrepresented his financial situation and in fact knew that the funds in the Totten trusts were his. The court found sufficient proof that the statements were false to warrant their admission, but this finding does not satisfy the test I would apply. The mere fact that a false statement was made is not enough. Statements which turn out to be false are often made in the good-faith but mistaken belief they are correct, cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and we should be cautious not to penalize good-faith assertions of Sixth Amendment rights.

I would affirm the judgment of the Court of Appeals.

A. Access to the Courts Represents a Fundamental Interested Guaranteed by the Equal Protection Clause.

The importance of access to the courts in our system of justice has been long recognized by this Court. See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *Chambers v. Baltimore and Ohio R.R.*, 207 U.S. 142, 148 (1907); *NAACP v. Button*, 371 U.S. 415, 429-430 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). The foundation for the right of access to the courts was succinctly stated by the first Mr. Justice Harlan in his dissent in *Chambers, supra*:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. 207 U.S. at 148.

And in *Truax v. Corrigan*, 257 U.S. 312 (1921), this Court, quoting from *Barbier v. Connolly, supra*, observed that:

> The Fourteenth Amendment . . . intended . . . that they [all persons] should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts . . . 257 U.S. at 334.

Other courts also have recognized the importance of the right of access to the judicial process and extended this right to indigent litigants. See, e.g., *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. Sup. Ct. 1972); *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (Cal. Sup. Ct. 1917); *Roberts v. Superior Court*, 264 Cal. App. 2d 282, 70 Cal Rptr. 226 (1968); *Chambers v. District Court of*

Dubuque, 152 N.W.2d 818 (Iowa Sup. Ct. 1967); *Jeffrey v. Jeffrey*, 296 N.Y.S. 2d 74, 57 Misc. 2d 416 (1969). See generally, Developments in the Law of Equal Protection, 82 Harv. L. Rev. 1065 (1969). Whether the right of access to the courts represents a fundamental interest that is protected under the doctrine of strict equal protection has not as yet been decided by this court. But, in at least one instance, the right of free access to the courts has been embraced as a fundamental interest under equal protection doctrine. *Lee v. Habib*, 424 F.2d 891 (D. C. Cir. 1970).

The appellant, however, does not rely solely upon his federal constitutional rights in asserting that his right of access to the courts represents a fundamental interest. The West Virginia Constitution accords appellant the constitutional right to appeal from a justice of the peace court to a court of record. *Richmond v. Henderson*, *supra*. (See Argument I. A., *supra*). This state constitutional right to appeal, coupled with this Court's aforementioned considerations concerning the importance of access to the judicial system, establishes appellant's right of access to the courts as a fundamental interest cognizable under the Equal Protection Clause.

The importance of appellant's interest in securing access to a court of record also stems from the inherent inequities of the West Virginia justice of the peace system. The justice of the peace forum was selected by the appellant's creditor for the manifest reason that the system practically guarantees judgment for the creditor-plaintiff. As noted previously (See Argument I. B., *supra*), the justice has a financial interest in the outcome of the litigation. He also is untrained in the law and such lack of expertise may redound to the detriment of a party, like the appellant, who asserts sophisticated legal defenses. (See Argument I. A., *supra*). By blocking

appellant's access to a court of record through the imposition of an appeal bond, he is unable to secure a fair determination on the merits of his defenses in an unbiased forum, thus he is denied a meaningful hearing.

In the recent decisions of *U.S. v. Kras, supra,* and *Ortwein v. Schwab, supra,* both of which involved an alleged monetary bar to a civil litigant's access to a court, this Court, asserting that the litigation involved the areas of economics and social welfare, did not apply strict equal protection standards and instead found a rational justification for the requirement. Neither of these cases is determinative of the issues at bar. Indeed, in *Kras*, Mr. Justice Blackmun, after discussing the applicable equal protection standard and refusing to apply the stricter test, noted that "there is no constitutional right to obtain a discharge in bankruptcy." ____ U.S. at ____, 93 S.Ct. at 638. Appellant, however, does have a constitutional right—a state constitutional right—to have his case heard before a court of record. *Richmond v. Henderson, supra.* Moreover, unlike the appellee in *Kras*, the appellant here has no alternative other than the judicial process since he must defend himself. And, unlike the appellant in *Ortwein*, the appellant here has not had the benefit of an unbiased determination of his case in the initial forum. These basic distinctions render this Court's recent rulings in *Kras* and *Ortwein* inapplicable to the instant case.

Therefore this Court should apply the more stringent compelling state interest test in determining whether the statutory double appeal bond denies appellant equal protection of the laws.

B. The Double Appeal Bond Requirement is not Reasonably Related to a Legitimate State Interest and Consequently Fails to Meet the More Stringent Compelling State Interest Test.

The more onerous double bond provision which is imposed upon an appellant from a justice of the peace court cannot be justified as being reasonably related to a valid state interest. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court, while upholding the constitutionality of the Oregon Forcible Entry and Detainer Statute, found that a double appeal bond imposed on F.E.D. appellants was unconstitutional. Mr. Justice White writing for the majority stated:

> [A] state may properly take steps to insure that an appellant post adequate security before an appeal . . . to guard a damage award already made. . . 405 U.S. at 77.

Relying primarily upon *Lindsey*, the lower court here found that the West Virginia double bond was rationally related to its purpose of protecting the person receiving a judgment in a justice of the peace court. (Appendix at 43). In urging affirmance The Attorney General asserts that the double bond represents a "reasonable procedural provision to safeguard a monetary award." (Motion to Dismiss or Affirm at 12). Further the Attorney General argues that the bond is conditioned to satisfy the judgment in full and any costs, interest or damages for delay. (*Id.*)

Appellant, however, contends that the double bond provision is not reasonably related to the above asserted objective. The justice of the peace court appellant is required to do more than post a bond that adequately guards an existing damage award; he is required to post a

bond in *twice* the amount of the judgment against him. In condemning the double appeal bond provision in *Lindsey*, this Court held:

> . . . the double bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damages sustained by the landlord. 405 U.S. at 77.

Likewise, the West Virginia double appeal bond provision is unrelated to the judgment or to any specific damages. Cf. *Gaines v. Hawkes, supra*. This double undertaking, an additional three hundred dollars in appellant's case, goes far beyond assuring the successful justice of the peace court litigant of his judgment and additional expenses upon appeal in the event that the appeal is unsuccessful and the additional expenses are awarded. To assert that it does is unfounded in fact and highly conjectural. There is no reason to assume that the appeal process will involve protracted litigation and ultimately result in the appellant owing twice the amount of the initial judgment. Clearly the double bond requirement does more than guard the existing damage award; it speculates, at appellant's expense, as to the outcome of the appeal and the final damage award. This does not meet the reasonableness requirement.

Contrary to the lower court's assertion, the West Virginia double appeal bond cannot be regarded as "substantially similar" to the general Oregon bond scheme which requires a bond to cover "all damages, costs and disbursements which may be awarded . . . on appeal." ORS § 19.040. (Opinion below at 11.) Unlike the Oregon provision, the West Virginia statute is not tailored to the eventual judgment award if the appeal is unsuccessful, and it is at best speculative as to the final award. It is a blanket requirement without flexibility.

The imposition of the double bond effectively penalizes the appellant. See *Lindsey v. Normet, supra*. In *Lindsey* this Court found that the Oregon double appeal bond which was forfeited to the landlord if the appeal proved unsuccessful operated as a penalty against those individuals who sought to appeal. 405 U.S. at 78-79. Here too a bond in double the amount of the judgment is required before an appeal can be taken from a justice of the peace court. If the bond cannot be posted the appeal is denied. The denial of the appeal and the attendant denial of the opportunity to be heard in a fair and impartial court of record constitutes the penalty. Furthermore, although the appellant does not ultimately forfeit his double bond, as the F.E.D. appellant did in *Lindsey*, he also is penalized by the simple fact that his initial appeal bond requirement is more onerous and requires a greater financial outlay than that faced by other appellants from courts of record. While an additional monetary outlay, which at maximum will be three hundred dollars, as in appellant's case, does not seem to be overburdensome to some, it represents a heavy financial sacrifice to many who are poor and barely can afford the necessities of life. See *U.S. v. Kras, supra*, ____U.S. at ____, 93 S.Ct. at 645 (Marshall, J., dissenting).

Undeniably the double bond requirement operates to bar the appeals of many litigants who, like the appellant, are poor and cannot post the requisite amount. This Court has consistentely ruled that classifications based on wealth are particularly objectionable and demand careful judicial scrutiny. E.g., *Edwards v. California*, 314 U.S. 160 (1041) (Jackson, J., concurring); *Douglas v. California*, 372 U.S. 353 (1963); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). And this has been widely

extended to those classifications based on wealth that burden an indigent's access to the judicial process. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961). Cf. *Lindsey v. Normet, supra*. In *Lindsey*, this Court stated:

> The discrimination against the poor. . . is particularly obvious. For them, as a practical matter, appeal is foreclosed no matter how meritorious their case may be. . . 405 U.S. at 79. See also *Jack Spring, Inc. v. Little, supra*; *Lee v. Habib, supra*.

This is precisely the same problem that confronts the appellant here. Despite the inequities and deficiencies in the justice of the peace court, the appellant is unable to appeal his case to an unbiased court of record. And the fact that any appeal bond—whether equal to or double the amount of the judgment—will prove burdensome to the poor does not justify imposition of the heavier burden. Certainly the state of West Virginia can insure a justice of the peace court judgment by less drastic means than the double appeal bond requirement. Cf. *Shapiro v. Thompson, supra*, 394 U.S. at 637-38 (1969); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Moreover the West Virginia appeal bond requirement is plainly overbroad and not reasonably related to the state's interest in guarding against frivolous appeals because it bars non-frivolous appeals by those who cannot afford the bond, while permitting appeals by those who can afford the bond. This is precisely the vice which this court condemned in *Lindsey*:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to post the bond but also

allows meritless appeals by others who can afford the bond. . . 405 U.S. at 78.

The rationale of this Court's decision in *U.S. v. Kras, supra*, and *Ortwein v. Schwab, supra*, is not applicable to the present case. In *Kras* this Court upheld the validity of the fifty dollar bankruptcy filing fee against an equal protection attack by noting that "It [Congress] sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." ____ U.S. at ____, 93 S.Ct. at 639. In *Ortwein*, this Court ruled that a twenty-five dollar filing fee to appeal an administrative decision denying welfare assistance was valid on the grounds that the fee helped offset court operating expenses. ____ U.S. at ____, 93 S.Ct. at 1175. Unlike each of these cases, the West Virginia double appeal bond is not utilized to offset any court or administrative costs. It is only for the benefit of the judgment creditor in the justice of the peace court proceedings. Indeed the West Virginia courts have no interest in the bond that is posted.

In summary, the double appeal bond requirement imposed by the State of West Virginia on litigants seeking to appeal a justice of the peace court decision is not reasonably related to any legitimate state interest, and thus, runs afoul of the Fourteenth Amendment Equal Protection Clause.

However, appellant contends that the West Virginia double appeal bond provisions should be judged not by the reasonableness test but by the more stringent compelling state interest test. As the appellant has demonstrated he has a fundamental interest in access to the courts. Since the double appeal bond is not reasonably related to the state's interest in protecting existing judgments or precluding frivolous appeals or offsetting

judicial costs, it likewise fails under the more exacting compelling state interest standard. Nor can the double bond requirement be justified by state fiscal or administrative considerations. Such considerations are not sufficient justifications for state classifications which invidiously discriminate among classes of its citizens. *Shapiro v. Thompson, supra*, 394 U.S. at 637-38; *Shelton v. Tucker, supra*, 364 U.S. at 488. But the appeal bond is not related to any state fiscal or administrative interests; its sole function, as the Attorney General has argued, is to safeguard the judgment-creditor's damage award. And it fails in this regard even under the less exacting reasonableness test. Thus, the West Virginia double appeal bond requirement cannot be sustained by a compelling state interest, and it therefore contravenes the Equal Protection Clause of the Fourteenth Amendment and appellant's rights thereunder.

CONCLUSION

The decision of the District Court upholding the constitutionality of West Virginia's double appeal bond was erroneous, and the judgment in favor of appelles should be reversed.

Respectfully submitted

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IN THE

Supreme Court of The United States

October Term, 1973

NO. 72-5830

CLOVER PATTERSON,

Appellant,

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Loudon District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

For convenience, the parties shall be referred to as the appellant and appellee.

The opinion of the Court below, jurisdictional statement, constitutional provisions and statutes, questions presented for review, and statement of the case are

sufficiently stated in appellant's brief, and we perceive no reason to duplicate them herein.

SUMMARY OF ARGUMENT

Neither the United States Constitution nor the West Virginia Constitution provides that one shall have the right to have a case such as this decided by one learned in the law, and it cannot be said that, because one has the right to be represented by counsel in civil cases and the right to require representation in criminal cases, he shall also have the absolute right to be heard before one learned in the law. The justice of the peace should not and cannot be considered a system that is chronologically out of place in the judicial system. The justice of the peace still has an important role to play in local law enforcement even in these days of such profound changes in every way of life and especially keeping with today's emphasis on individual rights. Courts of the justices of the peace in West Virginia are generally presided over by laymen. Realizing the importance of appellate review from all courts in the judicial system, the framers of the West Virginia Constitution provided for such review of justice of the peace judgments. However, it cannot be said that this so-called right of appeal from a justice of the peace court is a review as a matter of right which could not be regulated by the Legislature. In fact, it is the exact opposite. The West Virginia Constitution dictates that the Legislature will prescribe regulations which are to be followed if one wishes to appeal a decision of a justice of the peace. Therefore, it cannot be said that there exists an absolute right to appeal from the court of a justice of the peace. By placing an appeal bond as a regulatory pre-

requisite to appeal does not take away the right to appeal but only regulates the appeal.

The State of West Virginia does have an interest in protecting monetary judgements, safeguarding its judicial system and offsetting its court expenses, and the appeal bond does bear a reasonable relationship to that interest.

I.

A HEARING BEFORE A JUSTICE OF THE PEACE IS APPROPRIATE TO THE NATURE OF THE CASE AND THEREFORE SATISFIES DUE PROCESS OF LAW.

Appellant points out on page 7 of his brief that the justice of the peace was *important* in local law enforcement in the formative years of this country when there were few people and fewer lawyers. Why should one believe that because there are more lawyers today there is no longer a need for the justice of the peace. It should not have to be pointed out that there are proportionally more people today and it remains very hard to find a lawyer to handle a case which generally falls within the jurisdiction of the justice of the peace court. It must also be pointed out that in many instances it is not economically feasible to retain an attorney to appear in a justice of the peace court. Why shouldn't there be a court with limited jurisdiction, such as the justice of the peace court, where one may go without the necessity of having an attorney appear for him.

Appellant on page 9 of his brief cites *NAACP* v. *Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *Brotherhood of R.R. Trainmen* v. *Virginia ex*

rel. Virginia State Bar, 377 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967), and *Ward* v. *Winchester*, 11 Va. L. Reg. 501 (1902), for the proposition that there is a constitutional right of one involved in a civil matter to be represented and heard by an attorney at law and *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. ..... (1972), *Powell* v. *Alabama*, 287 U.S. 45, 77 L. Ed. 159, 53 S. Ct. 52 (1932), and the landmark case of *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), for the proposition that in criminal cases attorneys had to be provided to indigent defendants in misdemeanor and felony matters where loss of liberty was involved. The issue in the present case is not whether one has a constitutional right to be represented in civil and criminal matters but whether one has the right to appeal a judgment from a justice of the peace court without first paying the statutory bond pursuant to the West Virginia Constitution. In the first paragraph of appellant's argument reasons were pointed out why the justice of the peace system was instituted and those same reasons exist today. The justice of the peace courts were originally set up to handle the local legal problems and generally problems that were considered small in nature and in which lawyers were not necessary. Therefore, the right to be represented in civil matters and the right to require representation in criminal matters cannot be equated with the right to have a justice of the peace learned in the law. The appellant also contends that the justice of the peace system in West Virginia has educational deficiencies to such an extent that they prevent a fair and impartial trial. He contends that the

appellee, George Warner, as a layman and with no formal legal education, is unable to understand the legal arguments of appellant's counsel. In *State ex rel. Reece, et al.* v. *Gies, et al.*, ... W. Va. .....,—S.E.2d ..... (June 5, 1973), per Berry, Justice, at page 5, the West Virginia Supreme Court, in a case contesting the same statute which is presently being contested before this Court, citing *State ex rel. Moats* v. *Janco*, 154 W. Va. ....., 180 S. E. 2d 74 (1971), said that "this contention is without merit because of the constitutional provisions for such courts under the provisions of Article VIII of the Constitution of West Virginia." The same applies to the case at bar in that there is no merit in the contention of the appellant that the decision by the justice of the peace violates due process of law because the justice is without professional legal training. Article VIII, Section 1, of the West Virginia Constitution provides that:

> "The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in *justices of the peace.*" (Emphasis supplied.)

The office of the justice of the peace is established by Article VIII, Section 27,[1] of the West Virginia Constitution, which provides that the justice of the peace must reside in the district for which he was elected, and Article IV, Section 4,[2] requires that he must be a citizen entitled to vote. Article VIII, Section 28,[3] of the Constitution provides that:

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[1] West Virginia Constitution, Article VIII, § 27,
"Districting of County.
"Each county shall be laid off into districts, not less than three nor more than ten in number, and as nearly equal as may be in territory

> "* * * The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law."

The Constitution prescribes no further qualifications for the justice of the peace such as legal training and education or the status of a duly licensed attorney at law as contended by appellant. By Article VIII, the Supreme Court of Appeals, the circuit courts and their judges, and *justices of the peace* regardless of education, being created and provided for by the Constitution itself, are given the status of constitutional tribunals.

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and population. There shall be elected in each district containing a population not exceeding twelve hundred, one justice of the peace, and if the population exceeds that number, two such justices shall be elected therein. Every justice shall reside in the district for which he was elected and hold his office for the term of four years, unless sooner removed in the manner prescribed by law. The districts as they now exist shall remain till changed by the county court."

[2] West Virginia Constitution, Article IV, § 4,

"Persons Entitled to Hold Office—Age Requirements.

"No person, except citizens entitled to vote, shall be elected or appointed to any State, county or municipal office; but the governor and judges must have attained the age of thirty, and the attorney-general and senators the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their election or appointment, or be citizens at the time this Constitution goes into operation."

[3] West Virginia Constitution, Article VIII, § 28,

"Jurisdiction of a Justice of the Peace.

"The civil jurisdiction of a justice of the peace shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars. The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. And justices of the peace shall have authority to take the acknowledgment of deeds and other writings, administer oaths, and take and certify depositions. And the legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient, under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars. Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law."

Harbert v. *Harrison County Court*, 129 W. Va. 54, 39 S.E.2d 177 (1946).

Quoting *Moats*, the West Virginia Supreme Court in *Reece*, *supra*, at page 5, said that:

> " 'The Constitution prescribes no qualification for a justice of the peace except the requirement of Article VIII, Section 27, that he must reside in the district for which he was elected and the requirement of Article IV, Section 4, that he must be a citizen entitled to vote; and there are no additional qualifications prescribed for a justice of the peace such as legal training or the status of a duly licensed attorney at law as contended by the petitioner.
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> * * *
>
> " 'In view of the foregoing this Court holds that a duly elected justice of the peace who resides in the district for which he was elected is authorized and empowered to exercise within the county in which such district is located the jurisdiction conferred upon him by the Constitution and the statutes of this State; and *his lack of professional legal training and his inability to attain the status of a duly licensed attorney at law do not of themselves render his judgment of conviction of a defendant of a criminal offense of which the justice has jurisdiction violative of the due process clauses of the Federal and State Constitutions.*' " (Emphasis supplied.)

Also in *Moats*, at page 78, the Court said that:

> "* * * Though no person may engage in the practice of law unless he is a duly licensed attorney at law, a justice of the peace, in the trial and

> disposition of a case of which he has jurisdiction, is not engaged in the practice of law but instead acts in a judicial capacity and is engaged in the discharge of a judicial function."

Even counsel for the appellant admits on page 8 of the brief of the appellant that "there are no qualifications prescribed for justices of the peace. *Neither* the *state constitution, state statutes nor the common law* set forth any eligibility requirement * * *." (Emphasis supplied.) The Constitution of West Virginia is the fundamental organic law of the State so far as it is consistent with the provisions of the Federal Constitution. It was made by the sovereign people of West Virginia and by them alone, and only the people of West Virginia should unmake that Constitution. Wisely or not, the people of West Virginia have set upon themselves a court of limited jurisdiction where a layjudge presides and so long as such provisions do not discriminate against any identifiable class they do not violate the equal protection clause.

II.

EQUAL PROTECTION DOES NOT INCLUDE ABSOLUTE AND UNRESTRAINED APPELLATE REVIEW OF AN INITIAL ADJUDICATION BEFORE A JUSTICE OF THE PEACE COURT WHICH AFFORDED DUE PROCESS.

Appellant contends on page 12 of his brief that "given the nature of the justice of the peace system his right to be heard includes the appellate process." Under *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, 55 A.L.R. 2d 1055 (1956), and *Lindsey* v. *Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972),

due process does not require, even in criminal cases, that a state provide an appellate system. Once it does provide such a system, however, a state may not, in criminal cases, deny review merely because of a defendant's inability to pay the costs of appeal. *Griffin, supra.* It is not clear how far these constitutional guarantees may operate to insure such a right in civil proceedings. In civil cases there is no general right to proceed in forma pauperis. A state may require the posting of security in a shareholder's derivative suit, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), and a state, by means of an appeal bond requirement,

> "[M]ay properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession * * *." *Lindsey* at 53.

United States v. *Kras*, ... U.S. ....., 34 L. Ed. 2d 626, 93 S. Ct. ..... (1973), and *Ortwein, et al.* v. *Schwab, et al.*, ... U.S. ....., 35 L. Ed. 2d 572, 93 S. Ct. ..... (1973), stand for the proposition that a state may place financial obstacles in the path of access to a court where those obstacles have a rational justification, see *Cohen* v. *Beneficial Industrial Loan Corp., supra*, and where no fundamental interest of the person seeking access is involved. In only one kind of civil case —a divorce proceeding—has the Supreme Court found such a fundamental interest. *Boddie* v. *Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). The state's control over marriage and divorce has been found to be in a different category from its control over bankruptcy, see *Kras, supra*, or welfare payments, see

Ortwein, supra. The instant case, like *Kras* and *Ortwein,* involves an interest of far less constitutional significance than the interest in dissolving a marriage. The case at bar involves, moreover, an interest—rights under a sales contract—which depends even less for its enforcement upon judicial machinery than the interests of the appellants in *Kras* and *Ortwein,* and cannot be considered fundamental. In adjudicating rights under a sales contract, a court is far from being the exclusive means of dispute settlement, see *Boddie, supra.*

The appellants in *Ortwein* had had a pretermination evidentiary hearing by an administrative agency, and the due process requirement of a meaningful opportunity to be heard was thus satisfied. See *Goldberg* v. *Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Appellate review of a judgment of a justice of the peace is made available by statute in West Virginia, and it is the bond provision of that statute that is under attack before this Court. As in *Ortwein,* appellant, Clover Patterson, was accorded a full trial on the merits of his case in the justice of the peace court. Having received a hearing before the justice of the peace, appellant had a full opportunity to present a defense and therefore fulfilled the promise of the Due Process Clause of the Fourteenth Amendment of having an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Armstrong* v. *Manzo,* 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965); *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Therefore, the appeal bond has a valid and rational justification, see *Cohen* v. *Beneficial Industrial Loan Corp.* and *Lindsey* v. *Normet, supra.*

In *Ortwein, et al.* v. *Schwab, et al., supra*, this Court indicated that there are instances where due process does not necessitate a trial in a court of record or that the case be "adjudicated by one learned in the law." In *Ortwein*, a recipient of Oregon old age assistance, whose assistance was reduced $39 per month by the county welfare agency in a decision upheld on appeal by the Oregon Public Welfare Division, and a welfare recipient who received smaller welfare payments by reason of a decision of the Oregon Public Welfare Division, petitioned the Supreme Court of Oregon for a writ of mandamus requiring the Oregon Court of Appeals to accept their cases appealing the division's decisions, without payment of the Oregon $25 appellate court filing fee, because they were indigents and unable to pay the fee. The Supreme Court of Oregon denied the petition and on appeal, this Court affirmed. In a per curiam opinion it was held that the filing fee requirement was not a denial of due process, because the petitioners received agency pretermination evidentiary hearings meeting due process requirements, and that it did not violate the Equal Protection Clause as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses. This Court also said that it did not violate the equal protection clause as arbitrary and capricious in allowing others to appeal in forma pauperis. In *Ortwein*, a case analogous to the case at bar, there was not a court of record present and one learned in the law did not preside over the hearing; however, this Honorable Court held that due process was satisfied.

This Court affirmed the decision of the Supreme Court of Oregon for the same reasons that it found persuasive in *United States* v. *Kras, supra*. In the *Kras*

case this Court held that an individual's interest in obtaining a discharge in bankruptcy did not rise to the same constitutional level as one's inability to dissolve his marriage except through the courts. In *United States* v. *Kras*, the appellee's petition for voluntary bankruptcy was accompanied by a motion for leave to proceed without payment of filing fees, which amounted to less than $50. The appellee claimed that the filing fee requirement was unconstitutional. The district court, relying upon *Boddie* v. *Connecticut*, *supra*, which held that state statutes requiring the payment of court costs and fees were unconstitutionally applied to prevent indigents from suing for divorce, held that, as applied to appellee, the requirement of prepayment of a filing fee in order to obtain a discharge in bankruptcy violated the Fifth Amendment right of due process, including equal protection. On appeal by the government, this Court reversed the district court and held that the appellee's interest in the elimination of his debt burden, and in obtaining his desired new start in life, did not rise to the same constitutional level as a married person's interest in dissolving a marriage, and that the decision in the *Boddie* case did not control the disposition in the *Kras* case.

In both *Ortwein* and *Kras*, the plaintiffs did not get into court because of a filing fee, whereas in the instant case the appelant did have a hearing before a court at a meaningful time and in a meaningful manner which was appropriate to the nature of his case.

Appellant makes reference to *Richmond* v. *Henderson*, 48 W. Va. 389, 37 S. E. 653 (1900), for the proposition that Article VIII, Section 28, of the West Virginia Constitution entitles him to an appeal as a matter

of right. Appellant is basically correct; however, the right does not exist until there has been a compliance with Chapter 50, Article 15, Section 2, of the Code of West Virginia. Both *Richmond* v. *Henderson* and *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, 19 S. Ct. 580 (1899), another case cited by appellant, are distinguishable because they were concerned with the proposition that a retrial of a justice of the peace judgment did not violate the United States and West Virginia constitutional clauses prohibiting retrial. In *Richmond* v. *Henderson*, at page 405, the Court decided that:

> "* * * [I]n any civil action tried before a justice by a jury there may be the like appeal as in other cases, without any bill of exceptions or certificate of evidence, without any manifestation of error of law on the record, simply an appeal as of right, without any assignment of error or showing of error, which appeal of its own force nullifies the verdict and judgment and opens the case for trial *de novo* upon both law and fact in the circuit court, just as in cases tried by the justice without a jury."

There is nothing in the opinions of either case indicating that there is an absolute right to a trial de novo in the circuit courts without first complying with the regulatory manner of exercising the appeal. Appellant is obviously confused thinking that the right to appeal is a fundamental part of the judicial process and, therefore, no regulations at all may be placed by the Legislature on an appeal from a justice of the peace court. In fact, Article VIII, Section 28, the constitutional section relied on by the appellant for the proposition that an absolute right to appeal from the decision of a justice of the peace is, in actuality, the removal and

transfer of the controversy to a court of record for trial de novo, also states that "Appeals shall be allowed from judgments of justices of the peace in such manner as may be *prescribed by law*" (emphasis supplied), indicating that the drafters of the Constitution deliberately inserted the above sentence with the intention that there should be some form of regulating the manner of exercising the appeal. In *Home Sewing Mach. Co.* v. *Floding*, 27 W. Va. 540 (1886), the West Virginia Supreme Court said that where a party, against whom a judgment has been rendered by a justice of the peace, desires to appeal therefrom, he is entitled to such appeal as a matter of right, *if* he files with the justice of the peace the appeal bond. It appears that the Court meant that unless the party seeking the appeal complies with the statute, his right to appeal is no longer absolute, but becomes conditional, and to entitle him to the benefit of Chapter 50, Article 15, he must bring himself within its provisions by making his application for an appeal accompanied with the proper bond.

Appellee agrees with appellant that the appeal operates so as to vacate the judgment in the inferior tribunal and renders it ineffectual as the foundation of an action. However, there must be first the filing of the bond which perfects the appeal and vacates the judgment of the justice of the peace. *Cook* v. *Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835 (1918).

Appellant contends that a cash bond or a commercial surety "cause[s] appellant to lose the beneficial use of his property pending a hearing before a learned and unbiased judge." (See brief of appellant, page 19.) Citing *Brooks* v. *Small Claims Court*, 105 Cal. Rptr. 785, 789, ... P. 2d ....., 41 U.S.L.W. 2391 (1973),

appellant contends that the "loss of funds, the premium, in order to obtain the fair tribunal" was "taking of property without due process of law under the *Sniadach* rationale." (See brief of appellant, page 19.) However, appellee wishes to point out that the courts have consistently applied the rationale of *Sniadach* to strike down *summary* procedures that deprive persons of their property pending a hearing. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969). The *Brooks* case is distinguishable from the case at bar in that there was a statutory restriction on appearance by an attorney in the small claims court. There, the court ruled that an undertaking in connection with an appeal from a judgment entered in a small claims court constituted a taking of property prior to a due process hearing with the right to counsel. The first opportunity for representation by counsel arose at the trial de novo after appeal. But the appeal was conditioned on the filing of a surety bond in lieu thereof. In the case at bar, due process, as stated earlier by the appellee, was satisfied in that there was an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case, and a hearing in which appellant had the right to be represented by counsel if he so desired.

Appellant rightfully contends that "The function of the appeal bond in the West Virginia Justice of the Peace System is to provide '* * * security which the statute substitutes in place of the *advantage* which the plaintiff gains by the judgment. * * *'" (Emphasis supplied.) (See brief of appellant, page 19.) Further citing *Chewning* v. *Tomlinson*, 105 W. Va. 76, 78, 141 S. E. 532 (1928), counsel for appellate said that "It is

because of this security that the judgment is vacated." In that statement, appellant recognizes the "advantage" which plaintiff gains. However, on page 20 of the brief of appellant, counsel for appellant contradicts himself by saying that "plaintiff has no proprietary right in his judgment." Again counsel for the appellant cites *Richmond* v. *Henderson*, distinguished earlier, for the proposition that the appellant has an absolute right to appeal without the necessity of providing an appeal bond. In *Richmond*, the Court said that the appeal lies from the judgment of the justice of the peace rendered upon a verdict of a jury as in cases tried by him without a jury. It was the retrial on appeal that was questioned in that case as well as the *Capital Traction Co.* v. *Hof, supra*, case. In both *Richmond* and *Hof*, the issue was why a retrial on appeal did not violate the clauses prohibiting retrial.[4]

Under its general authority to regulate appellate procedure, the Legislature has the power to require the giving of a bond as a condition precedent to the right to appeal, unless such power is clearly excluded by the Constitution and such statutes do not violate constitutional provisions granting the right to appeal, as they do not restrict or deny the right, but merely regulate

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[4] West Virginia Constitution, Article III, § 13,

"Right of Jury Trial.

"In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law.

United States Constitution, Seventh Amendment

"*Trial by Jury in Civil Cases.*

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

the manner of exercising it. *Horn* v. *Blackwell*, 212 S. C. 480, 48 S.E.2d 322, 323 (1948).

It is reasonable to assume that, in considering the competing interests involved, namely, Graham Motor Company's right to judgment and Clover Patterson's right under a statute to appeal from an adverse judgment, the Legislature deliberately inserted the bond provisions with the intention of equalizing the inequities by specifically and unequivocally granting the protection to the plaintiff, Graham Motor Company, who was awarded a judgment in the justice of the peace action.

The requirement of an appeal bond is for the benefit of the appellee, its purpose being to secure the appellee against loss when there is no merit in the appeal, or the appeal is not prosecuted with effect. Public policy requires appellant to furnish appellee security against loss through unnecessary and unsuccessful appeals. *Bryan* v. *Luhning*, 106 S.W.2d 403 (Tex. Civ. App. 1937). It is not intended, however, as an additional security for the original indebtedness of the appellant. but as an indemnity to the appellee against further trouble, expense, and costs while the case is undergoing a review to ascertain whether or not error was committed or injustice done the appellant by the decree of the court below. *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U.S. 37, 99 L. Ed. 46, 75 S. Ct. 92 (1954).

The appeal bond is in no sense a substitute for the judgment appealed from; in fact, its vitality depends on the survival of the judgment, and its fate is inseparably linked with it. If the judgment is reversed, the

obligation of the appeal bond becomes void; if the judgment is affirmed, the obligation remains in full force and effect. *Rockwell* v. *District Court of Lake County*, 29 P. 454, 17 Colo. 118 (1891).

In *Reece* v. *Gies, et al., supra*, a case contesting the constitutionality of the same statute that is currently being attacked in the instant case, the West Virginia Supreme Court said that the requirements contained in Chapter 50, Article 15, Section 2, of the West Virginia Code, for giving of a bond in an amount double the amount of the judgment, bore a reasonable relation to the amount that may be subject to be recovered under the bond if the plaintiff prevailed on appeal and did not violate the due process or equal protection clauses of the Federal and West Virginia Constitution.

The arguments used by appellant in the instant case were also used in the *Reece* case. However, the Court did not agree with the arguments that there exists in West Virginia an absolute right to appeal in the justice of the peace system or that the appeal bond bars access to the courts, thus depriving appellant of any of his fundamental interests guaranteed by the due process and equal protection clauses.

The facts in the *Reece* case were very similar to the case at bar with the exception that it dealt with an unlawful detainer action. In the *Reece* case, at page 7 of the Court's opinion, the Court said that:

> "The double bond in the case at bar could never be more than $600 because the limit of the jurisdiction in a civil action before a justice of the peace is $300. If the appellant does not prevail the bond merely covers the judgment,

> interest and costs. The bond for the amount of the year's rent is to cover accrued rent while the tenant remains in the landlord's premises during the pendency of the appeal, and only the actual damages and cost, and actual rent owed during that time could be recovered under the bond. Both bond requirements bear a reasonable relation to the amount subject to be recovered under the bond. If the tenant were allowed to remain in the premises without paying rent or giving a bond to secure the payment of the damages and rent during the pendency of the appeal, a tenant could remain in the premises rent free during an appeal which could last, in some cases, for more than a year and result in the landlord being deprived of his property without due process of law."

Appellee contends that the West Virginia Court of Appeals was the proper court to interpret the State Constitution and the statutory provision now under attack in the present case, and that it correctly held that the appeal bond did not violate the due process or equal protection clauses of the Federal and West Virginia Constitutions.

III.

THE STATE APPEAL BOND REQUIREMENT IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

The bond requirement imposed by Chapter 50, Article 15, Section 2, of the West Virginia Code, on appellants from justice of the peace courts is reasonable and relevant to the State's interest and therefore is constitutionally valid and does not violate the Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution. The appeal bond is conditioned for the satisfaction of the judgment in full, together with all costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. *Omaha Hotel Co., et al.* v. *Kountze, et al.*, 107 U. S. 378, 381, 27 L. Ed. 609, 611, 2 S. Ct. 911 (1883).

In *National Union of Marine Cooks and Stewards* v. *Arnold, supra*, at page 38, this Court held that neither the Due Process nor the Equal Protection Clause of the Fourteenth Amendment was violated when the State of Washington's Appellate Court dismissed "an appeal from a money judgment" since the dismissal was a reasonable measure for safeguarding the collectibility of that judgment. At page 43 of the opinion, this Court said that "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." *District of Columbia* v. *Clawans*, 300 U. S. 617, 627, 81 L. Ed. 843, 847, 57 S. Ct. 660 (1937); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 80, 74 L. Ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460 (1930); *Reetz* v. *Michigan*, 188 U. S. 505, 508, 47 L. Ed. 563, 566, 23 S. Ct. 390 (1903); *McKane* v. *Durston*, 153 U. S. 684, 687, 688, 38 L. Ed. 867, 868, 14 S. Ct. 913 (1894).

In *National Union*, pending defendant's appeal to a state appellate court from a money judgment, the trial court ordered the defendant to deliver certain bonds to the court's receiver for safekeeping pending disposition of the appeal. Upon defendant's failure to deliver the

bonds, the trial court adjudged it in contempt, and the appellate court dismissed the appeal, after allowing defendant fifteen days within which to purge itself of contempt. At page 45 of the opinion, this Court said that:

> "The supplemental proceeding indicated that the $298,000 in bonds, to which the court directed its order, constituted the only substantial asset from which payment of respondents' judgment might be realized and that this asset might be dissipated unless placed in protective custody.
>
> "In appraising the reasonableness of the State's order, it is noteworthy that the court did not seek to apply the bonds to the satisfaction of respondents' judgment. It merely directed petitioner to deliver them to the court's receiver for safekeeping. *Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the court's order to safeguard petitioner's assets from dissipation pending such appeal.*
>
> "Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law." (Emphasis supplied.)

Here we are speaking of reasonable procedural provisions to safeguard a monetary award for an appellee who is rightfully entitled to it because of a lower court judgment. Therefore, Chapter 50, Article 15, Section 2, imposes a requirement which bears a clear and reas-

onable relationship to a valid State objective and which does not in any way discriminate.

Appellant contends that the West Virginia appeal bond requirement creates a second classification of persons who wish to appeal judgments from justice of the peace courts. Appellant contends that he was precluded from appealing the judgment because he was financially unable to post the required $600, and further that an individual in a position identical to the appellant, but with some financial means, could have posted the requisite bond. (See brief of appellant, page 25.) It should be remembered that the fact of poverty or inability to procure securities does not of itself relieve an appellant from the necessity of giving an appeal bond or other security unless so provided by statute. *Going's Administratrix* v. *Norfolk & Western Railway Co.*, 119 Va. 543, 89 S. E. 914, *aff'd*, 248 U. S. 538, 63 L. Ed. 409, 39 S. Ct. 22 (1918).

Appellant makes the contrast, "to appeal from [an adverse decision in] a court of record a party need only post an appeal bond 'in a penalty to be fixed by the court or judge.'" Appellant continues that "As a practical matter the [amount of the] appeal bond * * * is generally set at the amount of the judgment." (See brief of appellant, page 25.) It is reasonable to assume that the appellant in the present case considers an appeal bond in the amount of the judgment to be satisfactory, but one which doubles the amount of the judgment as invidious and discriminatory. However, the same issues could be raised concerning an appeal bond in the amount of the judgment. There would continue to be situations where the appellant would be required to raise an appeal bond equal in amount to the judgment.

There would remain the possibility that there are some who could not file the appeal bond because of their financial situations.

In *Omaha Hotel Company, et al.* v. *Kountze, et al., supra,* this Court set out the history of the appeal bond. At page 611 of the opinion, Justice Bradley, in showing a precedent for a Nebraska appeal bond, said that:

> "These enactments are substantially a reproduction of like clauses in the Judiciary Act of 1789 [1 Stat. at L., 73], as regards writs of error, and of the Act of 1803 [2 Stat. at L., 244], as regards appeals. The material words are the clause in the bond which declares '*That the plaintiff in error (or appellant) shall prosecute his writ to effect, and if he fail to make his plea good, he shall answer all damages and costs.*'
> • • •
>
> "By the common law a writ of error, without any security, was of itself a *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the common pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd, Pr., 530, 1145; Impey, Pr., C. P. 16; Petersd. Abr., tit. Error, I. (H, *a.*) The presentation of the writ issuing from the Superior Court, stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various Acts of Parliament were passed, requiring security in certain cases, in order that the writ might operate as a *supersedeas.* First, without re-

> ferring to a statute in the time of Elizabeth, the Statute of 3 James I., ch. 8, declared that no execution should be stayed or delayed, upon or by any writ of error, or *supersedeas* thereon, for the reversing of any judgment in debt upon a single bond, or a bond with condition for the payment of money only, or in debt for rent, or upon any contract, unless the plaintiff in error with two sufficient sureties, should first be bound to the plaintiff in the judgment, 'By recognizance, in double the sum recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error *non-prossed*, all and singular the debts, damages and costs, adjudged upon the former judgment; and all costs and damages to be awarded for the delaying of execution.' "

Petitioners rely on *Lindsey* v. *Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972), to show that the bond requirement imposed by the justice of the peace in accordance with Chapter 50, Article 15, Section 2, of the West Virginia Code cannot be reasonably related to a valid State interest. In the *Lindsey* case this Court held that the Oregon statute, requiring a tenant to post bond on an appeal from an adverse decision in an amount twice the rent expected to accrue pending the appellate decision and providing that if the landlord prevailed the landlord was entitled to collect the entire amount of the bond, was a denial of equal protection of the law because there was no reasonable relationship between the bond requirement and the actual rent accrued and damages sustained by the landlord. In that case the Court said at page 77 that:

> "* * * *While a State may properly take steps to insure that an appellant post adequate security*

before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. * * *" (Emphasis supplied.)

The bond requirement in the case at bar could never be more than $600 because the limit of the jurisdiction in a civil action before a justice of the peace is $300. If the appellant does not prevail, the bond merely covers the judgment, interest and costs. In the recent case of *Greer* v. *Dillard*, ___ Va. ___, 193 S.E.2d 668 (1973), the Supreme Court of Appeals of Virginia held that an indigent was required to post a $600 bond in order to appeal a case from a court not of record to a court of record, and the right to appeal was contingent upon satisfying the statutory requirements in connection therewith. Although an indigent against whom a money judgment had been entered was permitted to appeal without payment of the costs or fees in accordance with Virginia Code, Section 14.1-183, this statutory provision could not be construed as relieving an appellant from posting an appeal bond to cover the cost of the judgment entered against him. The Virginia court said that a bond, such as we have in the instant case, is not a fee or a cost and that, had the legislature intended to include appeal bonds in the in forma pauperis statute, it would have done so. The court said that its failure to do so could not be treated as an inadvertent omission to be supplied by judicial construction.

At page 670 of the opinion, the Court said that:

> "We cannot because we will not usurp the General Assembly's prerogative to write the laws and fix public policy. As a matter of public policy, it is one thing for the state to excuse indigents from payment of fees and costs which are essentially state interests; it is another thing for the state to excuse indigents from posting bonds designed to protect the judgment rights of successful litigants."

CONCLUSION

We conclude that so long as Chapter 50, Article 15, Section 2, of the Code of West Virginia does not discriminate against or authorize discrimination against any indentifiable class, it does not violate the equal protection or due process clauses.

Therefore, for the foregoing reasons and authorities cited herein, it is respectfully submitted that this Honorable Court affirm the decision of the District Court upholding the constitutionality of West Virginia's statute for an appeal bond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip D. Gaujot, counsel for appellee, do hereby certify that a true copy of the foregoing Brief for Appellee was served upon George R. Higinbotham and Paul J. Kaufman, counsel for appellant, by mail, by depositing said copy in the United States Postal Service mail, with first-class postage prepaid, on the 13th day of July, 1973, addressed as follows:

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

No. 72–5830

Clover Patterson, Appellant, *v.* George Warner, Etc., et al. | On Appeal from the United States District Court for the Southern District of West Virginia.

[February 26, 1974]

PER CURIAM.

We noted probable jurisdiction in this case, 411 U. S. 905 (1973), because it appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as to the validity of that provision of W. Va. Code § 50–15–2 (1966),[1] requiring a double bond as a condition for an appeal from a judgment entered by a justice of the peace in a civil case. See *Lindsey* v. *Normet*, 405 U. S. 56, 74–79 (1972).

In November 1968 appellant Patterson purchased a used automobile from appellee Graham Motor Company

[1] West Virginia Code § 50–15–2.

"The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . . or if he does not wish to stay the execution on such judgment, with condition to pay the costs of such appeal if the judgment appealed from be affirmed. In case there be judgment before the justice against the plaintiff for costs only, and the plaintiff desires to appeal, the bond shall be for costs, conditioned as aforesaid, and in a penalty not exceeding one hundred dollars. . . ."

under a deferred purchase money contract. That portion of the price not paid at the time of purchase was evidenced by a negotiable promissory note. After taking delivery of the automobile but before completion of his payments, Patterson encountered mechanical difficulties with the car. Finding himself unable to obtain satisfaction from Graham, Patterson undertook to reject the purchase, pursuant to W. Va. Code § 46–2–602 (1966), and made no further payments on the note.

Graham then sued Patterson in appellee Warner's justice of the peace court and, despite a number of defenses asserted by Patterson—breach of warranty, fraud, rightful repudiation, and others—obtained a judgment for $300 plus costs.[2]

Patterson sought to appeal the case to a court of record. Bond was set at $600, double the amount of the judgment, as § 50–15–2 specified. Patterson was unable to find an individual surety and, being indigent, was also unable to raise the amount required by a commercial surety. As a result, the appeal was not perfected and the judgment adverse to him became final.

Prior to execution on the judgment, Patterson instituted this purported class action in the United States District Court for the Southern District of West Virginia against Justice of the Peace Warner and against Graham. He sought injunctive and declaratory relief. A three-judge court was convened and upheld the challenged West Virginia statute. — F. Supp. — (SD W. Va. 1972). It reasoned that the full hearing before the justice, with the opportunity to present a defense, accorded appellant due process, and that there was no requirement that the State provide appellate review.

[2] Three hundred dollars is the monetary limit of the jurisdiction of a West Virginia justice of the peace in a civil action for the recovery of money. W. Va. Code § 50–2–1.

Turning to equal protection, the court held that a State may properly take steps to insure that an appellant post adequate security to protect a damage award already made, citing *Lindsey* v. *Normet, supra,* 405 U. S., at 77; that an appeal *in forma pauperis* in a civil case is a privilege, not a right; and that "the concept of Equal Protection does not include full and unrestrained appellate review of an initial adjudication which afforded Due Process." — F. Supp., at —. Patterson's request for relief was therefore denied.

After probable jurisdiction had been noted here, and shortly prior to the filing of briefs in this Court, the Supreme Court of West Virginia decided *State ex rel. Reece* v. *Gies,* — W. Va. —. 198 S. E. 2d 211 (1973). In *Reece* the portion of § 50–15–2 requiring an appeal bond in an amount double the damages plus one year's rent as a prerequisite to an appeal from a justice court in a suit for unlawful detention of real estate was under constitutional challenge. The West Virginia court, citing the decision in the present case and *Greer* v. *Dillard,* 213 Va. 477, 193 S. E. 2d 668 (1973), upheld the bond amount provision, with two of the court's five Justices dissenting on that issue, but went on to rule unanimously that the judgment entered against the defendant by a West Virginia justice of the peace was violative of the Due Process Clauses of the Federal and State Constitutions and was "void." — W. Va., at —, 198 S. E. 2d, at 216. Its rationale was that, because the justice's fee was enhanced when he ruled in favor of the plaintiff, he possessed a pecuniary interest in the case's outcome, and the parties therefore were denied a neutral and unbiased judge. See also *State ex rel. Moats* v. *Janco,* — W. Va. —, 180 S. E. 2d 74 (1971).

The judgment entered against appellant Patterson by appellee Warner was rendered pursuant to the same West Virginia statutory scheme that was challenged, in part

successfully, in *Reece*. Appellant, upon becoming aware of the *Reece* decision, filed a suggestion of mootness here. Appellee Warner at the time opposed the suggestion. Although that aspect of the case was not addressed in the briefs, it was discussed at oral argument. Tr. of Oral Arg. 3–6 and 34–36. Appellant, despite his having made the suggestion of mootness, asserted at oral argument that *Reece* had no retroactive application, and that the judgment entered against him was not void and the case was not moot. *Id.*, at 5. Appellee Warner contended otherwise, *id.*, at 37–38, stating that in West Virginia, under *Falconer* v. *Simmons*, 51 W. Va. 172, 41 S. E. 193 (1902), a supreme court pronouncement, with one exception, is fully retroactive in the sense that it is regarded as always having been the law.

Inasmuch as the decision of the Supreme Court of West Virginia in *Reece* was rendered after the entry of the judgment in the present case, the three-judge District Court had no occasion to consider whether the decision in *Reece* means that the judgment obtained by Graham against Patterson is void and whether the present case has become moot. We deem it desirable that the District Court, in the first instance, evaluate the effect of that intervening decision. Accordingly, the judgment of the District Court is vacated, and the case is remanded to that court for reconsideration in the light of *State ex rel. Reece* v. *Gies*, — W. Va. —, 198 S. E. 2d 211 (1973). In so doing, we intimate no view as to whether the case is or is not now moot.

It is so ordered.